IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION FOR**
v.	)	**APPROPRIATE RELIEF**
	)	**UNDER R.C.M. 1001(b)(4)**
MANNING, Bradley E., PFC	)	
U.S. Army, [redacted]	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 31 July 2013
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. COMES NOW PFC Bradley E. Manning, by counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 1001(b)(4), requests this Court to limit the Government's sentencing evidence to its proper scope.

STANDARD

2. A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).

DISCUSSION

3. R.C.M. 1001(b)(4) permits trial counsel "to present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. *Id.*

4. "The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.' " *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (*citing United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)). "Evidence is admissible on sentence which shows 'the specific harm caused by the defendant.'" *Id.* (*quoting Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). "Nevertheless, an accused is not 'responsible for a never-ending chain of causes and effects.'" *Id.* (*quoting United States v. Witt*, 21 M.J. 638, 640 n.3 (A.C.M.R. 1985), *pet denied*, 22 M.J. 347 (C.M.A. 1986)). "Moreover, appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in

bringing about the effect." *United States v. Fisher,* 67 M.J. 617, 621 (A. Ct. Crim. App. 2009)(*quoting United States v. Witt,* 21 M.J. 637, 640 (A.C.M.R. 1985).

5. As summarized in *United States v. Stapp*, 60 M.J. 795, 800-801 (A. Ct. Crim. App. 2004):

> In sum, evidence of the natural and probable consequences of the offenses of which an accused has been found guilty is ordinarily admissible at trial. However, not *every* circumstance or consequence of misconduct may be admitted into evidence during the pre-sentencing portion of court-martial. An accused is not responsible for a never-ending chain of causes and effects. The standard for admission of evidence under this rule is not the mere relevance of the purported aggravating circumstance to the offense. A higher standard is required. The evidence sought to be admitted must establish that the offense of which appellant has been found guilty contributed to those effects which the government is trying to introduce in evidence. Moreover, appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect. ... *cf.* Dep't of Army, Pam. 27–9, Legal Services: Military Judges' Benchbook, para. 5–19 (1 April 2001) (describing legal significance of intervening cause).

Id. (internal citations omitted). *See also United States v. Fisher,* 67 M.J. 617, 620-621 (A. Ct. Crim. App. 2009) ("...evidence in aggravation ... includes evidence of the natural and probable consequences of the offenses of which an accused has been found guilty, but not every circumstance or consequence of misconduct is admissible.... An accused is not responsible for a never-ending chain of causes and effects. The evidence sought to be admitted must establish that the offense of which appellant has been found guilty contributed to those effects which the government is trying to introduce in evidence.") (internal citations omitted).

6. In *United States v. Hardison,* 64 M.J. 279, 281-282 (C.A.A.F. 2007), C.A.A.F. described the meaning of "directly related" for the purposes of R.C.M. 1001(b)(4):

> The meaning of "directly related" under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted. Regarding the strength of the connection required between admitted aggravation evidence and the charged offense, this Court has consistently held that the link between the R.C.M. 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime. ... In regard to the strength of the connection needed, it is important to note that judicial discretion to admit uncharged misconduct under R.C.M. 1001(b)(4) was limited when the President promulgated the 1984 edition of the *Manual for Courts–Martial, United States* (1984 *MCM*), replacing the 1969 edition. The 1984 *MCM* replaced the original rule for the admission of evidence at sentencing, which allowed "any aggravating circumstances" with the requirement that the evidence in aggravation

be "directly related." *See Manual for Courts–Martial, United States* (1969 rev. ed.).

7. Case law has consistently held that evidence offered under R.C.M. 1001(b)(4) must also pass the test of M.R.E. 403. *See e.g. United States v. Hardison,* 64 M.J. 279, 281-282 (C.A.A.F. 2007)("The second limitation is that any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the test of Military Rule of Evidence (M.R.E.) 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact.").

8. During the testimony of Brigadier General (BG) Robert Carr and Mr. John Kirchofer, the Defense objected under both relevance and R.C.M. 1001(b)(4) to three general areas of testimony that can be categorized as follows:

(1) Chain of Events Testimony;
(2) "Could" Cause Damage Testimony; and
(3) Monetary Expenses and Use of Resources Testimony

The Defense believes that each of these general areas constitute impermissible testimony under R.C.M. 401; 1001(b)(4) and 403.

Chain of Events Testimony

9. BG Carr and Mr. Kirchofer's testimony, as well as many of the Government's other witnesses' intended testimony, amounts to testimony of a never-ending chain of causes and effects, i.e. that due to PFC Manning's conduct, a certain event happened that triggered another event that resulted in some remote harm. The testimony is nothing more than "when this happened, then that happened," "when that happened, this other thing happened" and "when this other thing happened, yet a final thing happened." PFC Manning is not responsible for a never-ending domino effect. Actions and activities of independent actors intervened in the meantime such that these fourth and fifth order effects cannot be said to be properly within the embrace of appropriate R.C.M. 1001 aggravation evidence. *See United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (error to admit murder-suicide note where it cannot be said that murder was directly related to or resulting from the conduct of the appellant).

10. Moreover, if the Government were to be permitted to advance an attenuated chain of events that seek to place many of the ills of the world at PFC Manning's feet, then the Court would have to allow the Defense to rebut this with evidence that PFC Manning's disclosures actually effected meaningful change in the world. For instance, PFC Manning's disclosures have been credited with empowering people in the Middle East and with precipitating "Arab Spring." *See http://www. thedailybeast.com/articles/2013/06/03/how-bradley-manning-changed-the-war-on-terror.html* ("Some commentators have credited Manning's leak with providing a spark for the revolutions that toppled the governments of Egypt and Tunisia and triggered uprisings in Bahrain, Libya, and Yemen, collectively known as the Arab Spring. Files leaked by Manning disclosed a secret relationship between the U.S. government and President Ali Abdullah Saleh of Yemen, to allow drone strikes inside the country where the United States was not in a declared war. Another cable detailed the private investments and holdings of the Tunisian ruling family."). The Defense submits that allowing either the Government or the Defense to go down

this road would be improper aggravation or mitigation and would run afoul of R.C.M. 1001(b)(4) and R.C.M. 1001(c)(1)(B) respectively.

"Could" Cause Damage Testimony

11. BG Carr and Mr. Kirchofer testified as to how PFC Manning's misconduct "could" have caused damage. Specifically, they testified the information could have revealed TTPs; could have added to the knowledge of our adversary as to how much information that the United States knew or did not know; could have endangered individuals identified as sources for the United States; could have further traumatized family members of soldiers that were either killed or injured during combat due to being named in the released SIGACTs; could have impacted our information sharing down to the lower levels because superiors would no longer trust individuals at lower levels to protect classified information; and that the damage from PFC Manning's misconduct could have been much worse if it were not for the IRTF. The Defense objected to this testimony as not being relevant or proper under R.C.M. 1001(b)(4). The time for "could" cause damage testimony was during the merits phase of the trial. During sentencing, the witnesses should be limited to testimony regarding whether PFC Manning's conduct "did" cause damage.

12. If something "could" happen, that means that it "did not" happen. If it "did not" happen (but only "could" happen), by definition, it cannot be directly related to or resulting from the accused's conduct. In other words, something that is directly related to or resulting from the accused's conduct is something that *actually did happen*, not something that *could happen*.

13. A court would not countenance "could" evidence in sentencing in any case, nor would a trial counsel even attempt to offer "could" evidence in aggravation. For instance, if an accused is convicted of drinking and driving, a trial counsel would not offer evidence that the accused *could have* hurt someone; a trial counsel would offer evidence that an accused did hurt someone. In an adultery case, a trial counsel would not offer evidence that the accused *could have* caused damage to his family relationship; a trial counsel would offer evidence that an accused did cause damage to his family relationship. In an assault case, a trial counsel would not offer evidence that the accused *could have* caused a concussion; a trial counsel would offer evidence that an accused did cause a concussion. This case should be no different. The fact that this case involves classified evidence does not change what can properly be admitted in sentencing – i.e. what PFC Manning's actions *caused*, not what PFC Manning's actions *could have* caused.

14. In addition to offering the speculative potential damage, the Government attempted to smuggle inadmissible hearsay under the basis of the expert's opinion. The Defense objected to this testimony, and argued that the respective witnesses were "fact" witnesses and not "expert" witnesses. Additionally, the Defense argued that the Government was simply trying to admit inadmissible facts or data through BG Carr and Mr. Kirchofer. The Court determined that this type of information was not admissible under M.R.E. 703 unless the Court determined that the probative value in assisting the Court to evaluate the expert's opinion substantially outweighs the prejudicial effect of the inadmissible facts or data. The Defense maintains that the admission of inadmissible fact or data is improper under M.R.E. 703 since the probative value of the information does not substantially outweigh the prejudicial effect.

Monetary Expenses and Use of Resources Testimony

15. BG Carr and Mr. Kirchofer both testified about the formation of the IRTF. Mr. Kirchofer testified in greater detail about the monetary and human resources expended in setting upon the IRTF. Specifically, Mr. Kirchofer testified that the IRTF obtained 75 computers and over 125 personnel to work in reviewing the disclosed information. Mr. Kirchofer also testified that over 300 individuals transitioned through the IRTF during its 10 month existence. Finally, Mr. Kirchofer testified that the cost of the IRTF was approximately $6.2 million. The Defense objected to this testimony as being improper under R.C.M. 1001(b)(4). The Defense argues that the monetary expenses and use of resources testimony was not directly related to or resulting from PFC Manning's misconduct since the expense of the IRTF was based upon an independent, intervening event – Secretary of Defense Robert Gates' decision to set up a task force to research the disclosures and determine what mitigation steps may be necessary. *See United States v. Fisher,* 67 M.J. 617, 621 (A. Ct. Crim. App. 2009)(testimony concerning the time devoted to appellant's court-martial and trial counsel's use of this evidence in sentencing argument was improper under R.C.M. 1001(b)(4)); *United States v. Stapp*, 60 M.J. 795, 800-801 (Army Ct. Crim. App. 2004)(military judge erred when he allowed a witness to testify concerning the effect of the court-martial itself upon the readiness of the company since the exercise of independent discretion to court-martial a soldier is not properly attributable to appellant as aggravation evidence).

16. The testimony from BG Carr and Mr. Kirchofer regarding monetary expenses and the use of resources is not directly related to or resulting from PFC Manning's conduct. The decision to create the IRTF was the result of the independent discretion of the Secretary Robert Gates. Secretary Gates established the IRTF in order to provide mitigation strategies, to identify insensitivities to religion or cultural beliefs with the releases, to research issues that might cause fractions with any coalition partner, and to provide notice of other possible releases. To provide an example of how this testimony is improper, assume an accused vandalized a building with spray paint. The costs of repainting the portion of the building vandalized would certainly qualify as proper aggravation under R.C.M. 1001(b)(4). However, if the owner of the building decided to repaint the whole building and hired an exterior designer to provide visual examples of how the building might look depending upon the color chosen, this expense would not be proper aggravation under R.C.M. 1001(b)(4). Similarly, if the building owner decided to expend significant resources in researching anti-graffiti paint options to avoid a future vandalism incident, such an expense would also not be proper aggravation under R.C.M. 1001(b)(4). In each instance, the cost of the designer and the cost of researching anti-graffiti paint would not be directly related to or resulting from the accused conduct since the act of the accused did not play a material role in bringing about the effect at issue. Instead, an independent, intervening event played the only important part in bringing about the effect – the owner decided to hire an exterior designer or research anti-graffiti paint. In the case at hand, the decision to establish the IRTF and to expend $6.2 million was a result of an independent, intervening event and is not proper aggravation under R.C.M. 1001(b)(4).

17. The Defense anticipates that many of the remaining Government witnesses will also offer testimony that relates to the expenditure of financial or human resources. These witnesses will attempt to testify that these expenses were done as part of either the investigation of PFC Manning's misconduct or the organization's response to PFC Manning's misconduct. In either instance, the testimony is improper since it is not "'the specific harm caused by the defendant.'"

United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995) (*quoting Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

CONCLUSION

18. In light of the foregoing, the Defense requests this Court to determine that the proffered chain of events testimony; "could" cause damage testimony; and monetary expenses and use of resources testimony is not proper aggravation evidence under R.C.M. 1001(b)(4). The Defense requests that the Court disregard the improper testimony offered by BG Carr and Mr. Kirchofer.

Respectfully submitted,

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